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Before the  
Federal Communications Commission  
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of

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Reexamination of Comparative  
Standards for New Noncommercial  
Educational Stations

MM Docket No. 95-31

**Opposition to Petition for Clarification and Reconsideration**

Real Life Educational Foundation of Baton Rouge, Inc., hereby opposes the Petition for Clarification and Reconsideration filed by Jimmy Swaggart Ministries ("Swaggart").<sup>1</sup> Therein, Swaggart seeks to insulate itself from the Commission's new noncommercial comparative criteria and at the same time grab an ill-deserved, but decisive threshold advantage under the new criteria.

No rational path could lead the Commission to simply reaffirm its prior decision – a decision based on antiquated and discarded comparative criteria. The Commission long ago admitted that its previous noncommercial criteria were indefensible. After Real Life appealed the Commission's grant of Swaggart's application and filed its brief, the Commission asked the court to remand the case noting that "the fact that the agency is reexamining the policy in a pending rule making is not enough, by itself, to permit the agency to continue to apply the policy in the

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<sup>1</sup>Petition for Clarification and Reconsideration, MM Docket No. 95-31 (filed July 10, 2000) [hereinafter cited as Swaggart Petition].

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face of proper challenges.”<sup>2</sup> The Commission subsequently admitted to the court that “the Commission has not adequately addressed arguments presented below concerning the manner in which the FCC decides comparative licensing proceedings for noncommercial educational broadcast stations.”<sup>3</sup> In short, the Commission never even attempted to defend its decision in court, preferring instead to seek a remand and decide it in light of a sound justification for its now abandoned criteria or new criteria adopted in this proceeding. Now, having adopted new criteria, the Commission would find it impossible to defend another decision awarding Swaggart the permit under the now discredited prior policy.

In this regard, Swaggart wrongly ignores that the Commission adopted new rules not only because they were more efficient, but also because the old rules no longer could be justified.<sup>4</sup> The Commission did choose a point system to replace comparative hearings in order to foster efficient decision making. The criteria used in the new point system, however, have nothing to do

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<sup>2</sup>Emergency Motion for Remand, Real Life Educational Foundation of Baton Rouge, Inc., v. FCC, No. 93-1320 (D.C. Cir., filed July 6, 1994).

<sup>3</sup>FCC Reply to Appellant’s Response to Emergency Motion for Remand, Real Life Educational Foundation of Baton Rouge, Inc., v. FCC, No. 93-1320 (D.C. Cir., filed July 12, 1994). Among the issues presented to the court by Real Life was:

Whether the FCC acted arbitrarily and capriciously or otherwise not in accordance with law by continuing to apply noncommercial comparative standards adopted in 1967 despite significant changes in the nature of noncommercial broadcasting, readily acknowledged by the FCC in other contexts, and, in particular, by continuing to consider the diversification criterion applicable in commercial comparative cases “meaningless” in noncommercial cases.

<sup>4</sup>Swaggart Petition at 5-6.

with efficiency. As the Commission observes, “The key to the success or failure of a point system would be the factors used for comparison.”<sup>5</sup> And, while the Commission acknowledged the efficiency benefits of its new point system, it first pointed out that it would “eliminate the vagueness and unpredictability of the current system, clearly express the public interest factors that the Commission finds important in NCE broadcasters, and select the applicant that best exemplifies these criteria.”<sup>6</sup> Swaggart’s attempt to seize on efficiency as the be-all-and-end-all of the Commission’s new criteria, therefore, is misplaced.

Finally, Swaggart’s loudly trumpeted gray area coverage advantage no longer may be considered pertinent. The Commission now has reevaluated and modified its standards for recognizing gray area or second service coverage advantages. It may not rely now on the discarded policy by which Swaggart still attempts to maintain its victory.<sup>7</sup>

Even under the new criteria, Swaggart would be entitled to no second service threshold advantage. First, Swaggart and Real Life proposed to serve the same community. The threshold 307(b) issue is invoked only if two applicants propose to serve different communities.<sup>8</sup> Second,

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<sup>5</sup>*Further Notice of Proposed Rule Making*, 13 FCC Rcd 21167, 21177 (1998).

<sup>6</sup>*Report and Order*, MM Docket No. 95-31, FCC 00-120 (released April 21, 2000) at ¶18.

<sup>7</sup>The comparative coverage analysis used in the Commission’s decision to grant Swaggart’s application also was derived from the now discredited criteria in *New York University*, 10 RR 2d 215 (1967).

<sup>8</sup>*Report and Order*, *supra*, at ¶¶ 24-25 and Appendix A; 47 CFR §73.7002(a).

even assuming that Swaggart and Real Life proposed to serve different communities, Swaggart's second service advantage of 29, 578 is insufficient to gain a threshold advantage. It constitutes less than 7% of the population in Swaggart's 60 dBu service contour. A threshold preference would require providing a second service to 10% of the population in Swaggart's 60 dBu service contour. The rationale for this criterion is to reserve outcome-determinative threshold coverage preferences to situations where the differences are significant.<sup>9</sup> Therefore, Swaggart's gray area coverage advantage offers no basis for reaffirming the award of the permit to Swaggart.<sup>10</sup>

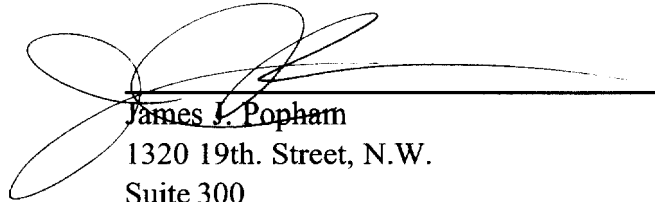
In view of the above, the Commission may not simply reaffirm its prior decision paying no regard to its new noncommercial comparative criteria.

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<sup>9</sup>*Report and Order, supra*, at ¶25.

<sup>10</sup>By the same token, Swaggart's effort to have the Commission utilize coverage data from the date of application rather than the date of adjudication is of no real consequence to Swaggart. As demonstrated above, Swaggart is entitled to no threshold preference even based on its coverage at the time of application. However, Swaggart's request does gloss over a significant issue. At the time Real Life and Swaggart filed their applications, applications were frozen for comparative purposes on the so-called B cut-off date – the last date an applicant could amend its application as of right. *See* 47 C.F.R. §73.3522(a)(2) (1993). After that date, an applicant could not improve its comparative position. Therefore, the coverage advantage considered in the Commission's decision was based on the applications as they existed on the B cut-off date. Whether Swaggart is referring to the date of application as the date of the original application or the date on which an application is frozen for comparative cases is unclear. Common sense and fairness, however, do dictate that the B cut-off date generally be considered the time of application to the extent that term is utilized to apply the new criteria to long pending applications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James J. Popham', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

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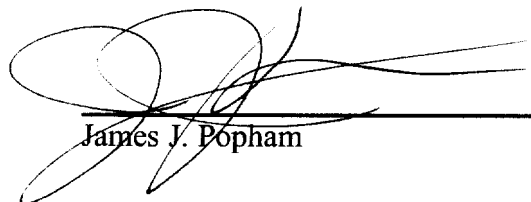
August 3, 2000

## **CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing opposition were served on this 3rd day of August, 2000, via first class mail, postage prepaid, upon the following:

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